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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. [redacted]

PENNSYLVANIA NATIONAL MUTUAL CASUALTY INSURANCE COMPANY,

Petitioner,

v.

LOUISE E. SPENCE (WIDOW OF JAMES T. SPENCE) AND TERMINAL SHIPPING COMPANY AND DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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TABLE OF CONTENTS

	PAGE
OPINIONS BELOW	1
JURISDICTION	3
QUESTION PRESENTED	4
STATUTES INVOLVED	4
STATEMENT OF THE CASE	5
REASONS FOR GRANTING THE WRIT	7
I. The Decision Below Raises Serious Questions As To The Interpretation Of The 1972 Amendments To The Longshoremen's and Harbor Workers' Act. The Requirement To Pay The New Death Benefit Created By The 1972 Amendments Of The Act Cannot Fairly Be Placed Upon The Carrier Whose Contract Of Insurance Was Mutually Terminated Before The Enactment Of The 1972 Amendments. Moreover, Such A Decision Places Unreasonable Burdens On The Claimant Seeking Benefits Under The Act	7
CONCLUSION	13
APPENDIX I — Decisions of the Court and agencies below	1a
APPENDIX II — Statutory Provisions	43a

TABLE OF CITATIONS

Alabama Dry Dock and Shipbuilding Company v. Kininess, 554 F.2d 176 (5th Cir. 1977), cert. denied 434 U.S. 903 (1977)	10
Finnerman v. McCormick, 499 F.2d 212 (10th Cir. 1974), cert. denied 419 U.S. 1049 (1974)	10
Hampton Roads Stevedoring Corp. v. O'Hearne, 184 F.2d 76 (4th Cir. 1950)	8, 9

	PAGE
Nacirema Operating Co. v. Lynn, 577 F.2d 852 (3rd Cir. 1978), cert. denied 99 S. Ct. 836 (1979)	10
N., B.&C. Lines v. Director, Office of Workers' Compensation Programs, 539 F.2d 378 (4th Cir. 1976), cert. denied 429 U.S. 1078 (1977)	9, 10
Norfolk, Baltimore & Carolina Lines, Inc. v. Director, Office of Workers' Compensation Programs, 539 F.2d 378 (4th Cir. 1976), cert. denied, 429 U.S. 1078, 97 S. Ct. 823 (1977)	7, 10
Pennsylvania National Mutual Casualty Insurance Company v. Spence, 591 F.2d 985 (1979)	8
Reed v. Yaka, 373 U.S. 410, 83 S. Ct. 1349, 10 L. Ed. 2d 488, reh. denied 375 U.S. 872, 84 S. Ct. 27, 11 L. Ed. 2d 101 (1963)	10
Sobolewski v. General Dynamics Corp., 5 BRBS 474 (1977) affirmed sub. nom. General Dynamics Corp. v. Benefits Review Board, 565 F.2d 208 (2nd Cir. 1977)	12
State Insurance Fund v. Pesce, 548 F.2d 1112 (2nd Cir. 1977)	7, 8, 10
Travelers Insurance Company v. Cardillo, 225 F.2d 137 (2nd Cir. 1955)	12

Statutes

28 U.S.C.:	
Section 1254(1)	3
Longshoremen's and Harbor Workers Act 33 U.S.C.:	
Section 904	4
Section 908	4, 8
Section 909	4, 5, 7, 8, 9
Section 914(e)	4
Section 919	6
Section 921	6
Section 922	6
Section 935	5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1088

PENNSYLVANIA NATIONAL MUTUAL CASUALTY INSURANCE COMPANY,

Petitioner,

v.

LOUISE E. SPENCE (WIDOW OF JAMES T. SPENCE) AND TERMINAL SHIPPING COMPANY AND DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner, Pennsylvania National Mutual Casualty Insurance Company, respectfully prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on January 25, 1979; the petition for rehearing and the suggestion for rehearing en banc having been denied by Order dated May 3, 1979.

OPINIONS BELOW

This is a claim initiated by Louise E. Spence on her behalf as Widow of James T. Spence for death benefits pursuant to amended Section 9 of the Longshoremen's

and Harbor Workers' Compensation Act against the Respondent, Terminal Shipping Company, and the Petitioner, Pennsylvania National Mutual Casualty Insurance Company.

On March 24, 1967 James T. Spence was injured in the course of his employment upon a vessel on navigable waters in Baltimore, Maryland. As a result of that injury, it was subsequently determined that he was permanently and totally disabled. This decision was affirmed by the Benefits Review Board in its Decision dated August 20, 1973.

James T. Spence died on November 14, 1973 from causes unrelated to the industrial injury. He was survived by his Widow, Louise E. Spence. Informal notification of the death was presented and a claim for death benefits was subsequently filed. The claim for death benefits was disallowed by the Deputy Commissioner and a formal hearing was held before Administrative Law Judge Edward H. McGrail on October 10, 1974. The Decision and Order of the Administrative Law Judge, *In the Matter of James T. Spence (Deceased Employee), Louise E. Spence v. Terminal Shipping Company and Pennsylvania National Mutual Casualty Insurance Company*, 75-LHCA-22, formerly No. 1114 (1974), rejected the argument of retroactive application of the new death benefit, but denied recovery because a valid Order for permanent total disability benefits had not preexisted the death of the employee.

An appeal from that Decision and Order of the Administrative Law Judge was taken to the Benefits Review Board by all parties. The Decision and Order was initially upheld in the Decision of the Benefits Review Board dated February 12, 1975. However, that Decision was rescinded for reconsideration by the Decision of the Benefits Review Board dated March 13, 1975 and subsequently reversed by the Benefits Review Board in its Decision dated September 29, 1975. A

Petition For Review was filed in the United States Court of Appeals for the Fourth Circuit on November 24, 1975. By Order dated February 17, 1976, the Petition For Review was dismissed for lack of administrative finality.

A hearing was held before Administrative Law Judge Philip J. Lesser on June 4, 1976. Upon the Decision and Order of Administrative Law Judge Lesser, *Louise E. Spence v. Terminal Shipping Company and Pennsylvania National Mutual Casualty Insurance Company*, 75-LHCA-22 (1976), it was determined that the Employer and Carrier were jointly and severally liable for the payment of the newly created death benefit. An appeal of this decision was taken to the Benefits Review Board and its decision, *Louise E. Spence v. Terminal Shipping Company and Pennsylvania National Mutual Casualty Insurance Company*, 7 BRBS 128 (1977), affirmed that of the Administrative Law Judge. The Benefits Review Board decision was appealed to the Fourth Circuit and was affirmed by that Court in *Pennsylvania National Mutual Casualty Insurance Company v. Louise E. Spence and Terminal Shipping Company and Director, Office of Workers' Compensation Programs, United States Department of Labor*, 591 F.2d 985 (1979). A petition for rehearing was denied by the Court in an Order dated May 3, 1979.

JURISDICTION

The petitioner submits that having filed within ninety days of the Order denying the petition for rehearing, that the provisions of 28 U.S.C. § 1254(1) confer on this Court jurisdiction to review the opinion and judgment in question by writ of certiorari. The decision and judgment sought to be reviewed were decided and entered by the Court of Appeals for the Fourth Circuit on January 25, 1979 affirming the decision of the Benefits Review Board approving the

conclusions of Administrative Law Judge Lesser directing an award to the widow of James T. Spence under 33 U.S.C.A. § 909, § 914(e). By Order filed May 3, 1979, and signed for the Court by Direction by William K. Slate, II, Clerk, United States Court of Appeals for the Fourth Circuit, the Petitioner's Petition for Rehearing and suggestion for rehearing en banc were denied.

QUESTION PRESENTED

1. Where the insurance Carrier's contract of insurance was mutually terminated before the 1972 Amendments of the Act, giving Carrier no opportunity to charge adjusted premiums to the insured subsequent to the 1972 Amendments, can the requirement to pay the death benefit created by the 1972 Amendments be fairly placed on the Carrier, especailly when such a decision would increase the burdens on the Claimant filing for benefits?

STATUTES INVOLVED

(1) 33 U.S.C. § 904, Longshoremen's and Harbor Workers' Compensation Act:

> "(a) Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 907, 908, and 909 of this title. In the case of an employer who is a subcontractor, the contractor shall be liable for and shall secure the payment of such compensation to employees of the subcontractor unless the subcontractor has secured such payment.
>
> (b) Compensation shall be payable irrespective of fault as a cause for the injury."

(2) 33 U.S.C. § 908, Longshoremen's and Harbor Workers' Compensation Act. (see Appendix II).

(3) 33 U.S.C. § 909, Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972:

> "If the injury causes death, or if the employee who sustains permanent total disability due to the injury thereafter dies from causes other than the injury, the compensation shall be known as a death benefit and shall be payable in the amount and to or for the benefit of the persons following: . . . "

(4) 33 U.S.C. § 935, Longshoremen's and Harbor Workers' Compensation Act:

> "In any case where the employer is not a self-insurer, in order that the liability for compensation imposed by this chapter may be most effectively discharged by the employer, and in order that the administration of this chapter in respect of such liability may be facilitated, the Secretary shall by regulation provide for the discharge, by the carrier for such employer, of such obligations and duties of the employer in respect of such liability, imposed by this chapter upon the employer, as it considers proper in order to effectuate the provisions of this chapter. For such purposes (1) notice to or knowledge of an employer of the occurrence of the injury shall be notice to or knowledge of the carrier, (2) jurisdiction of the employer by a deputy commissioner, the Board, or the Secretary, or any court under this chapter shall be jurisdiction of the carrier, and (3) any requirement, by a deputy commissioner, the Board, or the Secretary, or any court under any compensation order, finding, or decision shall be binding upon the carrier in the same manner and to the same extent as upon the employer."

STATEMENT OF THE CASE

The facts of this case material to the consideration of the question presented are undisputed. James T. Spence was employed by Terminal Shipping Company and at the time of his injury on March 24, 1967 Terminal

Shipping Company was insured for the payment of Workmen's Compensation benefits by Pennsylvania National Mutual Casualty Insurance Company. On January 1, 1970 Terminal Shipping Company was purchased by Atlantic and Gulf Stevedores, Inc., which assumed all the obligations of Terminal Shipping Company. The insurance contract between Pennsylvania National Mutual Casualty Insurance Company and Terminal Shipping Company was mutually terminated on February 1, 1971 and appropriate notices were filed with the office of the Deputy Commissioner. The stevedoring functions were thereafter conducted under the name of Atlantic & Gulf Stevedores, Inc. with Terminal Shipping Company acting as a steamship agent. Terminal Shipping Company notified the United States Department of Labor that Terminal Shipping Company's insurance would now be under Atlantic & Gulf Stevedores, Inc. (the parent company), which was self-insured.

The contractual relationship between Terminal Shipping Company and Pennsylvania National Mutual Casualty Insurance Company terminated on February 1, 1971. The prospective right to death benefits for a death unrelated to the industrial injury was created by the 1972 Amendments of the Longshoremen's and Harbor Workers' Act, which became effective on November 26, 1972. James T. Spence died on November 14, 1973 from causes unrelated to the industrial injury.

The basis for jurisdiction of the Federal Court and the Court of first instance is furnished by the provisions of 33 U.S.C. §901, *et. seq.*, governing the adjudication of claims brought under the Longshoremen's and Harbor Workers' Compensation Act together with routes of appeal from the decision of an Administrative Law Judge to the Benefits Review Board and, thereafter, to the United States Court of Appeals. 33 U.S.C. §§919, 921 and 922.

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW RAISES SERIOUS QUESTIONS OF INTERPRETATION AS TO THE 1972 AMENDMENTS TO THE LONGSHOREMEN'S AND HARBOR WORKERS' ACT. THE REQUIREMENT TO PAY THE DEATH BENEFIT CREATED BY THE 1972 AMENDMENTS OF THE ACT CANNOT FAIRLY BE PLACED UPON THE CARRIER WHOSE CONTRACT OF INSURANCE WAS MUTUALLY TERMINATED BEFORE THE ENACTMENT OF THE 1972 AMENDMENTS. MOREOVER, SUCH A DECISION PLACES UNREASONABLE BURDENS ON THE CLAIMANT SEEKING BENEFITS UNDER THE ACT.

The Petitioner does not now challenge the constitutionality of the Amendment of Section 909 of 33 U.S.C. Constitutional issues pertaining to retrospective application, conflicting inconsistencies and admiralty jurisdiction were decided in *Norfolk, Baltimore & Carolina Lines, Inc. v. Director, Office of Workers' Compensation Programs*, 539 F.2d 378 (4th Cir. 1976), *cert. denied*, 429 U.S. 1078, 97 S.Ct. 823 (1977). Identical principals were adopted in *State Insurance Fund v. Pesce*, 548 F.2d 1112 (2nd Cir. 1977). However, the issue presented by this case has not been reviewed by any Court other than the Court of Appeals for the Fourth Circuit in the decision which is the subject of this Petition. Every other case based on similar factual circumstances, including *Norfolk, Baltimore & Carolina Lines, Inc. v. Director, Office of Workers' Compensation Programs, supra,* to which the Court denied certiorari, has involved an insurance Carrier which offered coverage both before and after the 1972 Amendments of the Act. Therefore, the cases previously decided with respect to the 1972 Amendments are not dispositive of the case at issue in this petition. The payment of the death benefit in the instant case should be the obligation of Terminal Shipping Company (under the coverage of Atlantic & Gulf Stevedores, Inc., the qualified self-insurer) and not the obligation of Pennsylvania National Mutual Casualty Insurance Company, the former insurance Carrier.

A. The death benefit is a new and distinct cause of action from the injury benefit, and therefore, the cause of action for the death benefit arises at the time of death.

The Court of Appeals for the Fourth Circuit decided in *Hampton Roads Stevedoring Corp. v. O'Hearne*, 184 F.2d 76 (4th Cir. 1950) that a claim for death benefits is a separate cause of action under the Act, and the discussion by the Court on this point was followed in *State Insurance Fund v. Pesce*, 548 F.2d 1112 (2nd Cir. 1977). The precise issue in *Hampton* was whether injury and death benefits would be considered separately or together in determining the maximum award available under the Act. Admittedly, the issue in *Hampton* was somewhat different from that of the case presented on this petition, but the holding is still a sound one, as evidenced by the fact that the benefits for injury and death are outlined in separate sections of the statute. 33 U.S.C. § 908, § 909.

The Court in its decision below erroneously found that both types of recovery derive their basis from the injury. As a matter of logic, this cannot be a sound proposition. A cause of action cannot accrue under § 909 (death benefits) until the employee dies. *Pennsylvania National Mutual Casualty Insurance Company v. Spence,* 591 F.2d 985 (dissenting Widener, J.) (1979). Moreover, the Claimants under § 908 (injury compensation) and § 909 are different. Under § 908 the Claimant is the injured; under § 909 the Claimant is the widow.

The Petitioner does not claim, however, that since the two causes of action exist, that the prior insurer can avoid all liability. All classes of benefits in effect at the time of the Carrier's contract of insurance are reasonably the responsibility of that carrier, but the prior insurer should not be responsible for classes of benefits arising after the Carrier's contract of insurance is terminated.

The 1972 Amendments to the Act created a new class of benefits, which one cannot reasonably impute upon a Carrier whose contract of insurance was mutually terminated before the 1972 Amendments.

In support of its argument that the 1972 Amendment was only an increase in benefits, the majority in the Fourth Circuit Court of Appeals cites *N., B.&C. Lines v. Director, Office of Workers' Compensation Programs,* 539 F.2d 378 (4th Cir. 1976), cert. denied 429 U.S. 1078 (1977). Certain language in that opinion supports the majority decision, however, the issue in that case was the constitutionality of the 1972 Amendments. Moreover, the only authority cited by the Court in *N., B.&C. Lines* for the proposition that the 1972 Amendment was only an increase in benefits was *Hampton, supra.* In *Hampton,* however, the change in benefits was an increase of existing funeral expense benefits, and a removal of the maximum award payable. In both cases the benefits were already contained in the Act, and only the dollar amounts were changed.

The 1972 Amendments, with respect to the case at hand increased the class of Claimants beyond its previous scope. Prior to the 1972 Amendments, § 909 of 33 U.S.C. only applied to permanently and totally disabled persons dying as a result of their original injury. The 1972 Amendments now give § 909 death benefits to all permanently and totally disabled persons when they die, without regard to the cause of death.

The new death benefit is an increase in the scope of benefits that could not reasonably be anticipated by the Carrier at the time it fixed its premiums to the insured. Every insurance Carrier bases premiums on the anticipated risks insured. It is reasonable, given inflation and other economic conditions, for the insurer to base its premiums, in part, on anticipated increases in benefit amounts. It is totally unrealistic, however, to

require that the Carrier anticipate substantial increases in the class of potential Claimants. Any attempt to do so would make the fixing of premiums random and create administrative havoc. This situation is even more unfair when the carrier (because it is no longer under contract with the insured) no longer has an opportunity to adjust its premiums based on the 1972 amendments. In the other cases decided regarding the 1972 Amendments, eg., *Nacirema Operating Co. v. Lynn*, 577 F.2d 852 (3rd Cir. 1978), cert. denied 99 S. Ct. 836 (1979); *Norfolk, Baltimore & Carolina Lines, Inc. v. Director, Office of Workers' Compensation Programs, supra; State Insurance Fund v. Pesce, supra; N., B.&C. Lines v. Director, Office of Workers' Compensation Programs, supra,* the insurer remained the same before and after the 1972 Amendments. At least those Carriers could adjust their premiums to cover the cost of the new benefits, but this is not the case for Petitioner, and to impose this burden upon it is totally unfair and not within the intention of Congress.

B. Placing the requirement for payment of the new death benefit created under the 1972 Amendments upon the prior insurer, creates an unnecessary and unreasonable burden upon the Claimant seeking such benefits.

This Court has accepted an interpretation of the Longshoremen's and Harbor Workers' Act that favors the Claimant. The general language of the rule is that the Longshoremen's and Harbor Workers' Act should be liberally construed to promote the compensatory purpose of the Act. *Reed v. Yoka,* 373 U.S. 410, 83 S. Ct. 1349, 10 L. Ed. 2d 488, reh. denied, 375 U.S. 872, 84 S. Ct. 27, 11 L. Ed. 2d 101 (1963); *Alabama Dry Dock and Shipbuilding Company v. Kininess,* 554 F.2d 176 (5th Cir. 1977), cert. denied 434 U.S. 903 (1977); *Finnerman v. McCormick,* 499 F.2d 212 (10th Cir. 1974), cert. denied 419 U.S. 1049 (1974). Though factually these cases are

different from the one at issue at this time, the principal is still a sound one and should be applied to this case. Congress enacted the Act for the purpose of protecting the harbor worker. In doing so, Congress, as interpreted by the Court, intended to give the Claimant every advantage in obtaining benefits properly due. To further this policy with respect to the 1972 Amendments of the Act, the decision of the Fourth Circuit Court of Appeals in this case should be overturned. Terminal Shipping (and Atlantic & Gulf — its self-insured parent company) should be liable for the death benefits created under the 1972 Amendments. If this were the case, the Claimant would have a more certain source of funds than he would from an insurer no longer insuring his former employer. There is a better chance that the employing company will be in business than the insurance company which no longer writes insurance for that employer. Put in less severe terms, there is a better chance that the employer's current insurer will be able to pay the benefits to the Claimant, than an insurer which is no longer under Federal control, since it may have ceased writing this type of insurance.

Moreover, this decision by the Court below may potentially affect hundreds of Claimants. Anyone, totally and permanently disabled, who was injured prior to the 1972 Amendments and subsequently dies from causes unrelated to their injury, whether it be 50 years from now, will be placed in the position of having to collect from the insurer at the time of the injury. Such a result is not in line with the purpose of the Act. The purpose of the Act is to allow the Claimant ease of recovery of benefits to which he is rightfully entitled. Placing liability on the prior insurer, as did the Court of Appeals for the Fourth Circuit, ignores this purpose.

C. The decision by the lower court is in conflict with prior cases deciding the subsequent insurer issue and creates administrative chaos.

The general rule with respect to placing liability on an insurer in an occupational disease injury, is to place liability on the last insurer during which time the Claimant was exposed to injurious stimuli prior to the date Claimant became aware he was suffering from an occupational disease. *Travelers Insurance Company v. Cardillo,* 225 F.2d 137 (2nd Cir. 1955); *Sobolewski v. General Dynamics Corp.*, 5 BRBS 474 (1977) affirmed sub. nom., *General Dynamics Corp. v. Benefits Review Board*, 565 F.2d 208 (2nd Cir. 1977). This rule, as expressed by *Travelers Insurance Company, supra*, was reached for reasons of efficiency and ease of administration, two policies accepted by Congress in order to facilitate Claimants' recoveries under the Act.

The decision below in this case is in direct contravention of the Congressional policy and the prior Court decisions. By placing liability on the former insurer, the Court of Appeals for the Fourth Circuit charges insurers with the responsibility of covering benefits that cannot be reasonably anticipated. If, on the other hand, the current Carrier is held responsible for coverage under the 1972 Amendments, that Carrier will know who is totally disabled, who will be eligible for benefits, and therefore can fairly adjust their premium to the insured based on a rational decision.

It was for reasons similar to these that *Travelers Insurance Company, supra.*, decided that liability should be placed on the last insurer under the occupational disease questions. Administratively, it was not feasible to decide on another method of allocating risk. The method in relation to this case, adopted by the Court below, is administratively and efficiently unsound.

CONCLUSION

WHEREFORE, your Petitioner respectfully urges that this Court issue its Order granting it a Writ of Certiorari to review the decision herein of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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July 31, 1979

APPENDIX I

Decisions of the Court and Agencies Below

In the Matter of
James T. Spence (Deceased Employee)
Louise E. Spence
Claimant-Widow
v.
Terminal Shipping Company
Employer
Pennsylvania National Mutual
Casualty Insurance Company
Carrier

Case No. 75-LHCA-22

Formerly Case No. 1114

Before: Edward H. McGrail
Administrative Law Judge

Decision and Order

Statement of the Case

This case is brought pursuant to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901, *et seq.*, and amendments thereto (hereinafter referred to as the Act) and the Rules and Regulations implementing said statute, 20 C.F.R. Parts 701 and 702.

After due notice, a hearing was held before the undersigned on October 10, 1974, at Baltimore, Maryland. All parties were represented and were afforded full opportunity to be heard, to adduce evidence, to call, examine and cross-examine witnesses and make oral argument. Thereafter the parties filed briefs which have been duly considered.

Based upon the entire record in this matter and from my observation of the witnesses and their demeanor, the undersigned makes the following Findings of Fact, Conclusions of Law and Order.

Findings of Fact and Conclusions of Law

The Claimant in this matter is Louise Parker Spence, who is fifty-three (53) years of age and who married the deceased, James Spence, on March 11, 1941, in the City of Baltimore, Maryland. Four children, presently ranging in ages from twenty-five (25) to thirty-three (33), issued from this marriage.

At the time of their marriage, the Claimant and James Spence resided at 1018 North Carey Street, Baltimore, Maryland. The Claimant and the deceased lived at that address for approximately nine (9) or ten (10) years, during which time they separated and reconciled on several occasions. At the end of the nine (9) or ten (10) year period the deceased left the Claimant and his children, and took up a separate residence in the City of Baltimore and commenced cohabiting with another woman. Subsequent to this period, and while the children were small, the deceased visited them on occasions and gave them small amounts of money to be given to thier mother, the Claimant. From this point in time until the death of the deceased, no effort was made by either party to effect any further reconciliation. Both the Claimant and the deceased resided at different residences in the City of Baltimore, and until the time of his death, the deceased resided with the same woman he had originally resided with when he deserted his wife and children some twenty (20) or more years previous. During this period neither the Claimant nor

the deceased instituted any formal proceedings which would have led to a legal separation or divorce.

Documents of record (Cl. Exs. 1, 3) show that an award was made in favor of the deceased by the Deputy Commissioner, Fourth Compensation District, by Compensation Order, dated January 19, 1973 (Case No. 1114), for total permanent disability, and that such award was affirmed by the Benefits Review Board by its Decision, dated August 20, 1973, (BRB No. 108-73). Under this award compensation benefits were paid until the date of the decedent's death. (Cl. Ex. 3).

James Spence died on November 11, 1973, and it has been agreed by both parties that his death was unrelated to the injury for which compensation benefits had been awarded. (Cl. Ex. 4). Such benefits amounted to the maximum payable at the time of the award and have been increased since that time in accordance with § 910(f), 33 U.S.C. § 910(f). Based on this compensation award, the Claimant now seeks compensation for death benefits under § 909 of the Act, 33 U.S.C. § 909, as the widow of the deceased.

With regard to the Respondent's position that the award of compensation for death benefits was created as a new right by the 1972 amendments, hence to apply it here would be a retroactive application, of the amended law, it should be noted that such rights are separate, i.e., the right to compensation for injury and the right of the widow for death benefits, and have long been recognized as such. *Hitt* v. *Cardillo*, 131 F.2d 233 (D.C. Cir. 1942); *Hampton Roads Stevedoring Corp. v. O'Hearne*, 184 F.2d 76 (4th Cir. 1950). The only change involving § 909 with which we are here concerned is that prior to the amendments compensation for death benefits were contingent upon the employee's death resulting from the injury, whereas, the amendments provided for benefits even if the employee's death was due to causes other than the injury. The right of the Claimant here, the widow, did not arise until after the decedent's death which occurred after the 1972 amend-

ments. Therefore, the date of the decedent's death fixed the right of the Claimant. Rather than this being a retroactive application of the amended law, as contended by the Respondent, it is a prospective application and the Respondent's argument is without merit. Since it was prospective, the Employer's liability began at the time the amendments to the Act became effective. The case of *Addison v. Bulk Food Carriers, Inc.,* 489 F.2d 1041 (1st Cir. 1974) is inappropriately cited here by Respondent since that case, in considering retroactive versus prospective application of the 1972 amendments, dealt specifically with, and was limited to, the amended § 905, 33 U.S.C. § 905. The court there found that indeed § 905 was prospective since the Congressional intent was not to deprive a longshoreman of rights which existed prior to the 1972 amendments, i.e., avenues of redress available to him for injuries sustained prior to the amendments.

The only remaining question here is whether the Claimant is the widow of the deceased, and thus entitled to compensation for death benefits.

Both prior to and after the 1972 amendments "widow" was defined as including the decedent's wife living with or dependent for support upon him at the time of his death, or living apart for justifiable cause or by reason of his desertion at such time, 33 U.S.C. § 902(16). The record is uncontroverted that the Claimant was not living with the decedent, nor dependent upon him for support, at the time of the decedent's death. However, the record is equally uncontroverted that they were living apart for both justifiable cause and, by reason of the decedent's desertion. Justifiable cause, viewed in its strictest legal sence, has been held to be a matrimonial offense which would justify a divorce or legal separation. *Weeks v. Behrend,* 135 F.2d 258 (D.C. Cir. 1943). The facts are clear from the record that the deceased deserted the Claimant to live with another woman. I, therefore, find from the record as a whole that the Claimant is the lawful widow of the

deceased and as such would be entitled to compensation for death benefits under the Act.

However, in viewing the Deputy Commissioner's Compensation Order (Cl. Ex. 1) it is noted that such Order is dated January 9, 1973, a date following the effective date of the amendments to the Act, November 26, 1972. Subsequent to the date of the Deputy Commissioner's Compensation Order, and subsequent to the date of the Benefits Review Board Decision in this matter, (Cl. Ex. 2), the latter issued several decisions pertaining to the jurisdiction of the Deputy Commissioner to hold formal hearings and to issue compensation orders. In *RMK-BRJ v. Weinman,* BRB 140-73 (June 1974), the Board stated with regard to petitioner's position that the Deputy Commissioner was precluded from holding hearings in controverted cases after the effective date of the amendments, that:

> "This Board is in agreement with petitioner's position. Prior to the 1972 amendments, the deputy commissioner had both administrative duties and full adjudicatory authority. However, the amendment of § 19 of the Act, 33 U.S.C. § 919, conferred the adjudicatory powers on hearing examiners, or administrative law judges, qualified under the Administrative Procedure Act, 5 U.S.C. 554, divesting the deputy commissioner of the authority to hold hearings after the effective date of that amendment." (Citing § 19(d)).

The Board thus held that the deputy commissioner was without jurisdiction to hold hearings after the effective date of the 1972 amendment to § 19(d), regardless of whether there was jurisdiction when the hearings began, and was therefore without authority to issue and order pursuant to that hearing. In *Neal v. Strachan Shipping Company*, BRB 105-74 (June 1974), the authority of the deputy commissioner to issue a compensation order after the effective date of the 1972 amendments was specifically considered. The Board held that, in the absence of any express savings language, the 1972 amendments precluded the deputy

commissioners from issuing any orders pursuant to a hearing after the effective date of the 1972 amendments. (See also *J. Ray McDermott & Company, Inc. v. Barthelemy*, BRB 109-74 [April 1974])

Although it has long been held that § 909 of the Act established two separate rights, one compensating the employee for injury, and the other the death benefits payable to the widow, in order for a claimant to be successful in pursuit of compensation for death benefits under this Section, a valid compensation order for benefits relating to total permanent disability must be in effect. Based on the above rulings of the Benefits Review Board, the Deputy Commissioner, Fourth Compensation District, was without jurisdiction to issue his Compensation Order of January 9, 1973, and hence, it is invalid. Since the Deputy Commissioner's Order is the basis for the claim made herein, and that Order is invalid, the Claimant is without standing in this forum to claim compensation for death benefits under § 909, 33 U.S.C. § 909.

ORDER

IT IS HEREBY ORDERED, that this matter be remanded to the Deputy Commissioner for appropriate action pursuant to the amended Act.

EDWARD H. MCGRAIL,
Administrative Law Judge.

Dated: November 6, 1974
Washington, D. C.

Louise E. Spence
(Widow of James T. Spence)
Claimant-Petitioner
Cross-Respondent

v.

Terminal Shipping Company

and

Pennsylvania National Mutual
Casualty Insurance Company
Employer/Carrier-Respondents
Cross-Petitioners

DIRECTOR OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR
Petitioner

v.

Terminal Shipping Company

and

Pennsylvania National Mutual
Casualty Insurance Company
Employer/Carrier-Respondents

BRB No. 74-215

Decision

Appeal from Decision and Order of Edward H. McGrail, Administrative Law Judge, United States Department of Labor.

Before: Washington, Chairperson, Hartman and Miller, Members.

Hartman, Member:

Appeals from the Decision and Order (75-LHCA-22) of Administrative Law Judge Edward H. McGrail in

this matter have been taken by the Claimant, the employer/carrier and the Director, Office of Workers' Compensation Programs. A claim for death benefits was denied because it was found to be based on an invalid compensation order. The claim was filed pursuant to provisions of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, as amended, 33 U.S.C. § 901 *et seq.* (hereafter referred to as the Act).

The administrative law judge determined that the compensation order on which this claim is based was invalid. Consequently, he found the claimant to be without standing to claim compensation for death benefits under Section 9 of the Act, 33 U.S.C. § 909, and remanded the case to the deputy commissioner for appropriate action pursuant to the amended Act.

The Board finds that the administrative law judge was correct in holding the compensation order on which this claim is based to be invalid. *Towner v. General Dynamics Corp.*, 1 BRBS 25, BRB No. 74-130 (July 1, 1974). Therefore, his decision, remanding the case to the deputy commissioner for appropriate action pursuant to the amended Act, is affirmed.

Dated this 12th day
of February, 1975

Louise E. Spence
(Widow of James T. Spence)
Claimant-Petitioner
Cross-Respondent

v.

Terminal Shipping Company

and

Pennsylvania National Mutual
Casualty Insurance Company
Employer/Carrier-Respondents
Cross-Petitioners

Director, Office of Workers' Compensation Programs,
United States Department of Labor
Petitioner

v.

Terminal Shipping Company

and

Pennsylvania National Mutual
Casualty Insurance Company
Employer/Carrier-Respondents

BRB No. 74-215

ORDER

The Director, Office of Workers' Compensation Programs, has requested that the Board reconsider its decision of February 12, 1975, in this case, pursuant to Sections 802.407 and 802.408 of the Board's Rules of Practice and Procedure, 20 C.F.R. §§ 802.407, 802.408.

The Director has raised substantial questions of law which merit review by the Board. Therefore, the Board

hereby grants reconsideration of its decision of February 12, 1975, pursuant to Section 802.409 of the Rules of Practice and Procedure, 20 C.F.R. § 802.409.

All parties may file briefs with the Board on the issues raised in this case within thirty days of receipt of this Order.

RUTH V. WASHINGTON,
Chairperson.

RALPH M. HARTMAN,
Member.

JULIUS MILLER,
Member.

Dated this 13th day
of March 1975.

Louise E. Spence
(Widow of James T. Spence)
Claimant-Petitioner
Cross-Respondent

v.

Terminal Shipping Company

and

Pennsylvania National Mutual
Casualty Insurance Company
Employer/Carrier-Respondents
Cross-Petitioners

Director, Office of Worker's Compensation Programs,
United States Department of Labor
Petitioner

v.

Terminal Shipping Company

and

Pennsylvania National Mutual
Casualty Insurance Company
Employer/Carrier-Respondents

BRB Nos. 74-215, 215A, 215B

Decision

Appeal from Decision and Order of Edward H. McGrail, Administrative Law Judge, United States Department of Labor.

Before: Washington, Chairperson, Hartman and Miller, Members.

Hartman, Member:

Appeals from the Decision and Order (74-LHCA-22) of Administrative Law Judge Edward H. McGrail in this

matter were taken by the claimant, the employer/carrier, and the Director, Office of Workers' Compensation Programs. In that Decision and Order, a claim for death benefits was denied because it was found to be based on an invalid compensation order. The claim was filed pursuant to provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* (hereafter referred to as the Act).

Prior to the filing of Petitions for Review by the parties, the claimant and employer-carrier moved the Board to remand the case to the deputy commissioner for approval of an agreed settlement. The Director, Office of Workers' Compensation Programs (hereafter, the Director) opposed this motion to remand, contending that a deputy commissioner has no authority to settle a death benefits case pursuant to Section 8 (i) (A) of the Act. 33 U.S.C. § 908 (i) (A). The Board did not act on this motion. Instead, we determined that the administrative law judge was correct in holding the compensation order on which this claim is based to be invalid. Therefore, the Board summarily affirmed the Decision and Order of the administrative law judge, by which the case was remanded to the deputy commissioner for appropriate action pursuant to the amended Act. *Spence v. Terminal Shipping Company*, 1 BRBS 316, BRB No. 74-215 (Feb. 12, 1974).

On February 25, 1975, the Director filed a timely motion, requesting the Board to reconsider its Decision of February 12, 1975, to vacate that Decision, to permit the parties to file Petitions for Review and briefs addressing all issues raised in this case and to issue a new decision on the merits.

The Board issued an Order granting the Director's motion on March 13, 1975, having determined that the Director had raised substantial questions of law which merit review by the Board. Thereafter, Petitions for

Review and briefs were submitted by all parties. Oral argument was held in Washington, D. C., on August 28, 1975.

Having reconsidered its Decision of February 12, 1975, and reviewed the merits of the entire case, the Board hereby vacates that prior Decision. A decision on the merits of the entire case follows.

The claimant and decedent married in 1941. About ten years later, the decedent deserted the claimant, established a separate residence and commenced cohabiting with another woman. Neither the decedent nor the claimant ever instituted formal proceedings for legal separation or divorce. The decedent did not support the claimant and their children.

While an employee of Terminal Shipping Company, the decedent was injured in the course of his employment on March 24, 1967. As a result of his accident, the decedent was rendered totally disabled. He was awarded compensation for permanent total disability by Deputy Commissioner Herman Adler on January 19, 1973. That compensation order was affirmed by the Benefits Review Board. *Terminal Shipping Company v. Adler*, BRB No. 108-73 (Aug. 20, 1973). While receiving compensation for permanent total disability) the decedent died on November 11, 1973. It has been stipulated by the parties that death was caused by cirrhosis of the liver and was not related to the decedent's industrial injury.

Subsequent to the death of James Spence, the claimant filed a claim for death benefits, as widow of the deceased, pursuant to Section 9 of the Act, 33 U.S.C. § 909. The employer/carrier controverted this claim.

After a formal hearing of the case, the administrative law judge determined that the date of the decedent's death, not the date of injury, fixed the claimant's right to compensation under Section 9; that the claimant is the decedent's lawful widow; and that the claimant would be entitled to receive death benefits in accor-

dance with the amended Act if a valid compensation order for benefits relating to permanent total disability were in effect. He found that a valid compensation order awarding benefits to the decedent for permanent total disability was a necessary prerequisite to a claim for death benefits and that the compensation order issued by the deputy commissioner in January 1973 and later affirmed by this Board was, by authority of later Benefits Review Board decisions, invalid because it was issued after November 26, 1972, the effective date of the amendments to the Act. This Board has held that a deputy commissioner does not have authority to issue a compensation order on a controverted claim after November 26, 1972, despite the fact that all hearings on the claim were held prior to that date. *Towner v. General Dynamics Corp.*, 1 BRBS 25, BRB No. 74-130 (July 1, 1974). Therefore, the administrative law judge concluded that the claimant had no standing to claim benefits under Section 9, and remanded the case to the deputy commissioner for appropriate action pursuant to the amended Act. The claimant, employer/carrier and Director have all appealed parts of the Decision and Order below, placing several issues before the Board for resolution.

The pending motion of the claimant and employer-/carrier, requesting the Board to remand this case to the deputy commissioner for approval of a settlement agreed to by those parties, was orally denied at oral argument of this case. We reiterate that denial in this Decision. Neither an administrative law judge nor a deputy commissioner has authority to approve settlement of a claim for death benefits pursuant to Section 8 (i) (A). *S.H. Du Puy v. Director, Office of Workers' Compensation Programs,* ___ F.2d ___ (7th Cir. 1975).

The employer/carrier argue that the right to death benefits, in a situation where an employee who sustains permanent total disability due to an injury thereafter dies from causes other than the injury, which was newly created by the 1972 amendments to Section 9 of the Act, may not be asserted in this case. It is argued

that this provision may only be applied in a case where the injury which causes permanent total disability occurred after the effective date of the amendment. The Board has recently decided this issue in the case of *Lee Rouse v. Norfolk, Baltimore and Carolina Lines, Inc.*, 2 BRBS 11, BRB No. 75-101 (June 20, 1975). There, the Board stated:

> [T]he right to death benefits is a right which arises at the time the injured employee dies, and the law governing the question of whether death benefits are payable is the law in effect when the right arises.
>
> . . . To be constitutionally objectionable, the effect of the amended Act must be to disturb or destroy a vested right or impair a legal obligation in existence prior to the effective date of the 1972 Amendments. Here, the right of the widow and her children to claim death benefits did not arise until the date of decedent's death, nor did the employer have any potential obligation to pay death benefits until that date.

The Board held that amended Section 9 is applicable to a case such as this where injury occurred before, and death after, the effective date of the amendments. Application of amended Section 9 in this case is prospective, not retrospective, since the benefit conferred is a right which accrued after the effective date of the amendments. Therefore, amended Section 9 is applicable to the present case.

In his Decision and Order in this case, the administrative law judge found that:

> [I]n order for a claimant to be successful in pursuit of compensation for death benefits under this Section, a valid compensation order for benefits relating to total permanent disability must be in effect. . . . Since the Deputy Commissioner's Order is the basis for the claim made herein, and that Order is invalid, the Claimant is without standing in this forum to claim compensation for death benefits. . . .

These conclusions are not correct.

It is the policy of the Act to encourage voluntary payment of compensation without an award. Section 9 does not under any circumstances, condition the survivors' entitlement to death benefits on there being in existence a formal order awarding benefits for permanent total disability to the decedent as a result of his injury. If we were to read into Section 9 a requirement that a formal award of compensation for permanent total disability must be in effect before survivors are entitled to claim death benefits, substantial numbers of survivors, whose decedents had received voluntary payment of compensation for permanent total disability, would be excluded from coverage under Section 9. Such a condition would be contrary to the policy and intent of the Act and is not required by Section 9.

Since Section 9 cannot and does not condition entitlement to death benefits on there being in effect a valid compensation order awarding benefits for permanent total disability, such a compensation order cannot be the basis for a claim for death benefits in every case. Therefore, even if the order awarding the decedent compensation in this case is invalid, that order is not the basis of this claim for death benefits and it cannot be said that the claimant in this case is without standing to claim death benefits because no valid compensation order is in effect.

A claim for death benefits is a separate cause of action which belongs to survivors and arises at the time the injured employee dies; it is distinct from the injured employee's own prior claim for disability compensation. *Lee Rouse, supra.* The language of Section 9 indicates that the principal prerequisities of a valid claim for compensation in a case such as the one before this Board include an employee who sustained permanent total disability due to an employment-related injury, death of that employee from causes other than the injury, and a qualified survivor. It has been held that when an injured employee dies, a new cause of action arises which requires an adjudication of all questions

such as accident, notice of death, claim, causal relationship and dependency. *International Mercantile Marine Co. v. Lowe,* 93 F.2d 663 (2d Cir. 1938). [Obviously causal relationship is no longer a question which must be adjudicated.]

In this case, it was stipulated that James Spence, the injured employee, died from causes unrelated to his injury. The claimant was found to be the decedent's lawful widow and that finding is not challenged in this appeal. Timeliness of notice of death and of filing the claim for death benefits were not controverted. The claimant produced the deputy commissioner's compensation order of January 19, 1973, and subsequent Decision of this Board affirming that order, as evidence that the decedent has sustained an employment-related injury which rendered him permanently totally disabled. The employer/carrier did not dispute the validity of that order and did not at any time in proceedings before the deputy commissioner or the administrative law judge question whether or not the decedent was permanently totally disabled as a result of his injury. The Act contains a presumption that a claim for benefits comes within its provisions, in the absence of substantial evidence to the contrary. 33 U.S.C. § 920(a). It has been held that this provision requires the party opposing a claim to take some affirmative action to place in issue an essential element which is seemingly undisputed. *Ingalls Shipbuilding Corp. v. Neuman*, 322 F. Supp. 1229 (S.D. Miss. 1970), *aff'd.* 448 F.2d 773 (5th Cir. 1971). This seems particularly true, under the circumstances of this case, where the parties were proceeding under the assumption that there was no question that the decedent was permanently totally disabled prior to his death. *See Ingalls, supra*, where the question of paternity of children claiming death benefits as dependent survivors was not raised by the parties in proceedings before the deputy commissioner. The employer's attempt to question the extent of the decedent's disability prior to death for the first time in this appeal comes too late. *See Parker v. Motor Boat Sales*, 314 U.S. 244 (1941). The statutory presumption of

coverage falls only when the employer has satisfied the burden of introducing substantial evidence to rebut the presumption. *Travelers Insurance Co. v. Belair*, 412 F.2d 297 (1st Cir. 1969). The employer did not question the extent of the decedent's disability prior to his death. Decisions of this Board which would provide a legal theory to support a challenge to the validity of this Board's own prior decision affirming the deputy commissioner's compensation order of January 19, 1973, awarding compensation for permanent total disability to the decedent, were available to the employer/carrier. They did not question the validity of this prior award and did not assert that the decedent was not permanently totally disabled. The claimant, therefore, is entitled to the benefit of the presumption that her claim is within the coverage of the Act.

It is irrelevant that the administrative law judge found the deputy commissioner's compensation order, affirmed by the Board, to be invalid. We have concluded that the existence of a valid compensation order is not a prerequisite to a claim for death benefits. The Decision and Order below implies that the question of the extent of the decedent's disability prior to his death has never been resolved. However, since the parties acted, throughout proceedings before the deputy commissioner and the administrative law judge, as though that question had been resolved and the employer/carrier did not take advantage of the legal theory available to them in light of this Board's decision in cases such as *Towner v. General Dynamics Corp., supra*, the claimant was entitled to believe that there was no question in this case that the decedent was permanently totally disabled prior to his death and the administrative law judge erred in raising that issue, by inference, in his Decision and Order. *See Britton v. Great American Indemnity Co.*, 290 F.2d 381 (D.C. Cir. 1961).

The Board concludes that the claimant is entitled to an award of death benefits pursuant to Section 9 of the Act. It is, therefore, unnecessary to consider other

issues raised by the Director in this appeal and we decline to do so.

Counsel for the claimant has requested a fee for services performed in behalf of the claimant in this case. Upon submission of separate itemized applications for fees to the Chief Administrative Law Judge and to the Benefits Review Board respectively, in accordance with Sections 702.132 and 802.203 of the Rules and Regulations, 20 C.F.R. §§ 702.132, 802.203, requests for fees will be approved for services rendered in prosecution of this claim before the administrative law judge and before this Board. When approved, the attorney's fees awarded will be payable in a lump sum by the employer/carrier.

This case is hereby remanded to the Office of Administrative Law Judges for entry of a compensation order awarding death benefits to the claimant, consistent with this opinion.

RALPH M. HARTMAN,
Member.

We Concur:

RUTH V. WASHINGTON,
Chairperson.

JULIUS MILLER,
Member.

Dated this 29th day
of September, 1975.

United States Court of Appeals
For The Fourth Circuit

No. 75-2267

Terminal Shipping Company
and
Pennsylvania National Mutual
Casualty Insurance Company,
Petitioners,

v.

Louise E. Spence
(Widow of James T. Spence)
and
Director, Office of Workers' Compensation Programs,
United States Department of Labor
and
Benefits Review Board,
Respondents

ORDER

The petition for review of Terminal Shipping Company and Pennsylvania National Mutual Casualty Insurance Company, the motion of Louise E. Spence, etc., for a writ of mandamus, etc., and the answer thereto having been read and considered, and it appearing that no computation of benefits payable to Louise E. Spence has yet been made, and, further, that Pennsylvania National Mutual Casualty Insurance Company still proposes to litigate before the Administrative Law Judge the question of whether it is the proper insurance carrier to pay benefits should the same be payable, the court is of the view that the order sought to be reviewed lacks sufficient administrative finality to give the court jurisdiction in the premises.

Acting on its own motion, it is, with the concurrence of Judge Craven and Judge Butzner, ORDERED that the said petition for review be, and the same is hereby, dismissed. With the concurrence of Judge Craven and Judge Butzner, it is further ORDERED that the motion for a writ of mandamus, etc., be, and it is hereby, denied.

For the Court:

HARRISON L. WINTER,
United States Circuit Judge.

February 12, 1976

In the Matter of:
Louise E. Spence
Claimant

v.

Terminal Shipping Company
Employer
and
Pennsylvania National Mutual
Casualty Insurance Company
Carrier

Case No. 75-LHCA-22

OWCP No. 1114

Before: Philip J. Lesser
Administrative Law Judge

DECISION AND ORDER

In this case arising under the Longshoremen's and Harbor Workers' Compensation Act (LHWCA) work-

men's compensation death benefits are claimed by Louise E. Spence as the widow of James T. Spence who sustained an accidental injury in the course of his employment on March 24, 1967 and, while receiving compensation for permanent total disability due to that injury, died of unrelated causes on November 11, 1973.

A Decision and Order was previously entered in this case denying death benefits to the Claimant-widow. On appeal, the Benefits Review Board, reiterating its view first expressed in *Lee Rouse v. Norfolk, Baltimore and Carolina Lines, Inc.*, 2BRBS 11 (June 20, 1975), held that the 1972 amendment to Section 9 of the LHWCA conferred upon a widow the right to receive death benefits where the employee had sustained a permanent total disability due to an employment injury incurred prior to the effective date of the amendment and where he died of unrelated causes subsequent thereto (2BRBS 308, September 29, 1975). Accordingly, the Board reversed the previous decision of the Administrative Law Judge and remanded the case for entry of a compensation order awarding death benefits to the Claimant-widow. A further appeal to the Fourth Circuit Court of Appeals was dismissed as premature pending the completion of the action contemplated by the Board's remand. This case is presently before me pursuant to that remand for the entry of an order awarding workmen's compensation death benefits to the Claimant-widow.

In defending against the claim the Respondent-insurance carrier contends that it is not liable for payment of the award to the Claimant-widow since its policy of insurance covering the workmen's compensation liability of the Respondent-employer terminated prior to the death of the employee. I find no merit in that argument.

The initial act in the chain of events culminating in liability for death benefits was the employee's accidental injury arising out of and in the course of his employment. Absent that injury there would be no liability for any death benefits. Thus, the Claimant-widow's right to death benefits has it source in the compensable injury sustained by the decedent-employee even though her benefits did not actually accrue until after his death. The liability of the Employer and Carrier to provide workmen's compensation payments for the employee's disability and their contingent liability to the surviving widow in the event of his death was fixed at the time of the accident regardless of whether death was due to the injury or not. Accordingly, both the Employer and Carrier are jointly and severally liable for the payment of such benefits.

The only remaining question for resolution in this case is whether the death benefits payable to the Claimant-widow under Section 9 of the LHWCA should be measured by the provisions of that section in effect at the time that James T. Spence was injured or by the more liberal provisions of that section as amended in 1972 after his injury but before his death. It has consistently been held that prior amendments to Section 9 which increased the measure of death benefits under the LHWCA were applicable to cases where the amendment was enacted prior to the employee's death even though the enactment was subsequent to his injury. See *Penn Jersey Welding Co. v. Lowe,* 183 F.2d 936 (C.A. 3, 1950), *Hampton Roads Stevedoring Corp. v. O'Hearne,* 184 F.2d 76 (C.A. 4, 1950) and *Travelers Insurance Co. v. Toner,* 190 F.2d 30 (C.A. D.C., 1951), all of which involved in the 1948 amendment to Section 9 of the LHWCA, and *Siems Drake Puget Sound v. O'Leary*, 98 F. Supp. 1019 (D.C., Washington, 1951), which involved the 1942 amendment to Section 9 of LHWCA. Accordingly, death benefits in this case will be computed in accordance with the provisions of Section 9 as amended in 1972. The periodic adjustment of benefits under Section 10 of the LHWCA is not

applicable to this case. *Witthun v. Todd Shipyards Corporation*, 3 BRBS 146 (January 8, 1976).

In accordance with all of the foregoing I make the following:

Findings of Fact and Conclusions of Law

1. On March 24, 1967, James T. Spence sustained an accidental injury arising out of and in the course of his employment with the Respondent-Terminal Shipping Company (Employer) whose liability for workmen's compensation benefits under the LHWCA was insured by Respondent-Pennsylvania National Mutual Casualty Insurance Company (Carrier).

2. The average weekly wage of James T. Spence at the time of his injury was $157.00.

3. James T. Spence became permanently and totally disabled as a direct result of the said injury of March 24, 1967, which disability persisted up to and including the date of his death.

4. The said James T. Spence died on November 11, 1973, of causes unrelated to his injury of March 24, 1967.

5. The Employer and Carrier paid workmen's compensation benefits to the said James T. Spence for his permanent total disability up to and including the date of his death.

6. Louise E. Spence, the Claimant herein, was married to the said James T. Spence on March 11, 1941 and was living apart from him at the time of his death by reason of his desertion of her at some time prior thereto. The Claimant is the widow of the deceased James T. Spence within the meaning of that term as it is defined in the LHWCA.

7. On or about February 1, 1971, the Employer ceased its stevedoring operations and has not had any employees subject to the LHWCA since that date.

8. On or about February 1, 1971, the Carrier terminated its policy of workmen's compensation insurance with the Employer.

9. The Employer and Carrier are jointly and severally liable for the payment of workmen's compensation death benefits to the Claimant-widow based upon the employment of the said James T. Spence by the Employer under the LHWCA at the time of his accidental injury on March 24, 1967 and based upon the insurance coverage by the Carrier of the Employer's liability under the LHWCA on that date.

10. In consideration of the nature and extent of the legal services rendered to the Claimant by her attorney in connection with the proceedings before the Administrative Law Judge prior to the appeal to the Benefits Review Board, and in connection with the proceedings before me subsequent to the appeal, all of which totalled approximately thirty-six hours, and in consideration of the complexities of the issues involved particularly in connection with the initial proceedings before the Administrative Law Judge prior to the appeal in this case, and in consideration of the amount of compensation that the said attorney's efforts have been able to obtain for the Claimant, a legal fee in the amount of $2,500.00 is deemed to be fair and reasonable and is herewith approved. By Order dated December 22, 1975, the Benefits Review Board approved a legal fee of $1,800.00 in favor of the Claimant's attorney for his services on behalf of the Claimant in connection with the appeal before the Board, and the Board further directed that payment of such fee be made by the Employer and Carrier to the Claimant's attorney.

ORDER

1. The Employer and Carrier shall pay to the Claimant compensation for death benefits at the rate of $78.50 per week (fifty percent of the employee's average weekly wage at the time of his injury) commencing November 12, 1973, to the present date and continuing in accordance with the provisions of the LHWCA.

2. The Employer and Carrier shall pay to the Claimant interest at the rate of six percent per annum on all compensation due to the Claimant computed from the date that each payment was due until the date of actual payment. They shall also pay to the Claimant pursuant to Section 14(e) of the LHWCA an additional amount of compensation equal to ten percent of all accrued compensation due to the Claimant.

3. The Employer and Carrier shall reimburse Cora Spence Day, the sister of the deceased employee, the sum of $1,000.00 for funeral expenses of the deceased employee paid by her.

4. The Employee and Carrier shall further pay to the Claimant's attorney, I. Marshall Seidler, Esq., the sum of $2,500.00 for his legal fee in representing the Claimant in the proceedings before the Administrative Law Judges together with and in addition to the sum of $1,800.00 previously approved by the Benefits Review Board for legal services in representing the Claimant on the appeal before the Board.

Dated: August 10, 1976.
Washington, D.C.

Louise E. Spence
(Widow of James T. Spence)
Claimant-Respondent

v.

Terminal Shipping Company
Employer-Respondent

and

Pennsylvania National Mutual
Casualty Insurance Company
Carrier-Petitioner

Director, Office of Workers' Compensation Programs,
United States Department of Labor,
Party-in-Interest

BRB No. 76-385

DECISION OF BENEFITS REVIEW BOARD
Dated December 15, 1977

This is an appeal by the carrier from a Decision and Order (75-LHCA-22) of Administrative Law Judge Philip J. Lesser pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et. seq.* (hereafter referred to as the Act).

James T. Spence was injured on March 24, 1967 while employed by Terminal Shipping Company when a heavy roll of sheet copper fell on his foot. He later became permanently totally disabled as a result of this injury. On November 11, he died from causes apparently unrelated to this injury. His widow (claimant) filed for death benefits pursuant to Section 9 of the Act, 33 U.S.C. § 909, on January 17, 1974, in that the deputy commissioner had found her husband permanently totally disabled on January 9, 1973. However, the claim

for death benefits was denied, Administrative Law Judge McGrail concluding that the award of permanent total disability by the deputy commissioner was made without the requisite authority. The Board initially affirmed the administrative law judge's decision. However, on reconsideration, the Board reversed the administrative law judge's decision holding that there is no need for a formal award of permanent total disability before death benefits can be awarded. The Board also held that the payment of death benefits based on an injury occurring prior to the 1972 amendments was not a retroactive application of the amendments in that the right to death benefits arose at the time the employee died and the law as to death benefits in effect on that date controls. The Board's decision was appealed to the Court of Appeals for the Fourth Circuit. However, the Court dismissed employer-/carrier's appeal as interlocutory in that the issue of carrier's liability was not yet litigated before the administrative law judge. Carrier contended that it is not responsible for death benefits for a death occurring in 1973, in that it had ceased being employer's carrier on February 1, 1970.

On January 1, 1970, majority control of Terminal Shipping Company was purchased by Atlantic and Gulf Stevedoring Corporation. When Atlantic and Gulf purchased Terminal Shipping, it took all of its obligations but included in the purchase contract was a warranty against undisclosed liabilities. Terminal Shipping continued its stevedoring operations until February 1, 1971. On or about that date, its stevedoring functions were consolidated with those of Atlantic and Gulf. Terminal Shipping has continued in existence but as a steamship agent. Carrier's insurance coverage also terminated on February 1, 1971. A letter to this effect was sent to the deputy commissioner, and carrier's certificate of compliance was also apparently returned to the deputy commissioner. The letter, signed by Terminal Shipping's accountant, indicated Terminal

Shipping's coverage would now be under Atlantic and Gulf Stevedoring Company which is self-insured.

Administrative Law Judge Lesser in a Decision and Order dated August 10, 1976 awarded claimant death benefits holding Employer and Carrier jointly and severally liable for the payment of such benefits noting:

> The initial act in the chain of events culminating in liability for death benefits was the employee's accidental injury arising out of and in the cause of his employment. Absent that injury there would be no liability for any death benefits. Thus, the Claimant-widow's right to death benefits has its source in the compensable injury sustained by the decedent-employee even though her benefits did not actually accrue until after his death. The liability of the Employer and Carrier to provide Workmen's Compensation payments for the employee's disability and their contingent liability to the surviving widow in the event of his death was fixed at the time of the accident regardless of whether death was due to the injury or not.

The administrative law judge also assessed an additional payment of compensation pursuant to Section 14(e) of the Act, 33 U.S.C. § 914(e) for employer/carrier's failure to timely controvert the claim.

Carrier appeals contending it is not responsible for any payments under the Act.

While a claim for death benefits is a separate cause of action under the Act [*See Hampton Roads Stevedoring Corp. v. O'Hearne*, 184 F.2d 76 (4th Cir. 1950)] it is clear that the liability of the employer and the carrier is fixed at the time of injury, and not the date of death.

In *Norfolk, Baltimore & Carolina Lines, Inc. v. Director, Office of Workers' Compensation Programs*, 539 F.2d 378 (4th Cir. 1976), *cert. denied*, ___ U.S. ___, 97 S. Ct. 823 (1977), the Fourth Circuit found that death benefits were payable upon the death of employees injured prior to the effective date of the 1972 amendments who were permanently totally disabled at the

time of death, irrespective of the fact that the death was not casually related to the injury. Prior to the 1972 amendments, death benefits were payable only if the death was causally related to the injury.

The Court found that Congress had the power under the admiralty clause to expand the causal connection clause of the original Act. This retroactive application of the changed statute is not impermissible "not withstanding the employer and the insurer may have believed they had contracted rights in the limitation of benefits called for by the Act." *Norfolk, Baltimore & Carolina Lines Inc. v. Director, Office of Workers' Compensation Programs, supra.* Thus, employer's liability for death benefits is fixed at the time of injury.

The carrier who was on the risk at the time of the employee's injury is likewise liable. Its liability would apparently flow both from Congress' power to retroactively alter the terms of the contract, and from the fact that under Section 35 of the Act, 33 U.S.C. § 935, the carrier by providing compensation under the Act becomes bond for the full obligations of the employer under the Act.

The Board also agrees with the administrative law judge's determination that additional payments of compensation were payable under Section 14(e). Section 14(d) provides that the employer must controvert a claim within fourteen days after knowledge of the injury or death. If employer does not timely controvert, a payment of additional compensation is due under Section 14(e). Employer/carrier was aware of the claim months before it actually received the formal claim on June 26, 1976. It did not controvert the claim until after its receipt of the formal claim. Employer/carrier argues that it should not be penalized for failing to timely controvert in that it had relied upon an earlier recommendation of the deputy commissioner that no benefits were payable. However, the Board has concluded that reliance on the recommendation of the deputy commissioner does not excuse the payment of

additional compensation under Section 14(e). *Alston v. United Brands Co.,* 5 BRBS 600, BRB No. 76-296 (March 18, 1977). Inasmuch as employer/carrier failed to controvert the claim within fourteen days after knowledge of the death, the Section 14(e) assessment of additional compensation is mandatory. *Ryan v. McKie Co.,* 1 BRBS 221, BRB No. 74-160 (Dec. 10, 1974).

Accordingly, the Decision and Order of the administrative law judge is affirmed.

Dated this 15th day of December, 1977

United States Court Of Appeals
For The Fourth Circuit

No. 78-1088

Pennsylvania National Mutual Casualty Insurance Company,
Petitioner,

v.

Louise E. Spence
(Widow of James T. Spence) and
Terminal Shipping Company and
Director, Office of Workers' Compensation Programs,
United States Department of Labor,
Respondents.

On Petition for Review of an Order of the Benefits Review Board, United States Department of Labor.

Argued: December 5, 1978. Decided: January 25, 1979

Before Winter, Russell and Widener, Circuit Judges.

RUSSELL, Circuit Judge:

This appeal presents a controversy between an employer and its insurance carrier over which is liable

for death benefits payable under the 1972 Amendments of the Longshoremen's Harbor Workers' Compensation Act. 33 U.S.C. § 901, *et seq.*

The facts generating this controversy are not in dispute. On March 24, 1967, the employee, on account of whose death these benefits were claimed, suffered an injury on a vessel in navigable waters in the course of his employment by Terminal Shipping Company. This injury resulted in a compensation award for total and permanent disability under the Act. On November 11, 1973, over six years later, the employee died from causes unrelated to his injury, while he was receiving from the petitioner his compensation benefits as previously awarded him.

At the time of his injury, the employer's insurance carrier was the petitioner Pennsylvania National Mutual Casualty Insurance Company and it remained as such until the policy was terminated on or about February 1, 1971. On January 1, 1970, the employer Terminal Shipping Company was acquired by Atlantic and Gulf Stevedores, Inc. The latter became a self-insurer, as permitted under § 935, 33 U.S.C., after the termination of the Pennsylvania National's insurance policy.

Following the employee's death, the widow filed for death benefits under the Act. There is agreement between the parties at this stage of the proceedings that there is liability for death benefits under § 909, as amended in 1972, a point conclusively established in *N., B. & C. Lines v. Director, Office of W.C.P.* (4th Cir. 1976) 539 F.2d 378, *cert. denied* 429 U.S. 1078.[1] The single question on appeal is whether the petitioner Pennsylvania National Mutual Casualty Insurance Company as

[1] The amendment of § 909 became effective on November 26, 1972. 86 Stat. 1265.

the employer's insurance carrier at the time of the deceased's injury is also liable for the death benefits due on account of the death of the employee in 1973 or whether the liability is solely that of the Atlantic and Gulf Stevedores, Inc. as successor to the Terminal Shipping Company.[2] The administrative law judge to whom the matter was referred found that the petitioner insurance carrier was liable both for death benefits and for a penalty award under § 914(e), 33 U.S.C. On appeal, the Benefits Review Board affirmed and the petitioner in due course has filed a petition for review of the decision of the Benefits Review Board under the terms of § 921(c), 33 U.S.C.[3] We dismiss the petition and affirm the decision of the Benefits Review Board.

The argument of the insurance carrier for non-liability begins with the contention that, under *Hampton Roads Stevedoring Corp. v. O'Hearne* (4th Cir. 1950) 184 F.2d 76, the liability for death benefits under the Act is a separate and distinct right of action from that for disability compensation and arises only at the time of the death of the employee. From this premise it argues that it could not be held liable for any right of action for death benefits which only arose after its policy had been terminated. This is particularly so, it adds, because the liability for death benefits was substantially enlarged over those existing at the time of the employee's injury and at the time its policy was terminated, by the 1972 Amendments to the Act, which make such benefits payable even if death of the employee were unrelated to the compensable injury. On the basis of this argument, the insurance carrier contends the Benefits Review Board erred in holding it liable for death benefits in this case in which the employee's death and the consequent right of action for

[2] There were various other proceedings not germane to the issues presented by this appeal.

[3] For the procedure before the Benefits Review Board and on appeal by petitioner for review to the Court of Appeals, *see Presley v. Tinsley Maintenance Service* (5th Cir. 1976), 529 F.2d 433 at 435-436.

death benefits only arose in 1973 after its policy had been terminated in 1971.

The Act does provide, as the carrier urges, for two separate rights and types of recovery, the beneficiaries of which are different. One embraces the compensation payable to the disabled employee by way of disability benefits; the other represents death benefits payable to certain statutorily designated beneficiaries. But both types of recovery derive their basis from the same event, *i.e.*, the employee's injury. It is that event which gives both a right to compensation payments under § 908 and a right to death benefits under § 909. Neither right of action, whether for compensation payments or for death benefits, exists apart from the critical fact of injury; each is dependent for its basis on the injury. It is inaccurate, therefore, to state that the right to the death benefits has its origin solely in the event of death; the real source of the liability for such benefits under the Act traces directly back to the injury itself.

The petitioner accepts this reasoning so far as it represents a basis for finding liability on the part of the employer. It thus concedes that the employer is liable, even though death occurred long after the employee had ceased to work for the employer and even though the death benefits had been increased between the time of injury and the time of death by the 1972 Amendments. In making such concession, however, it overlooks the fact that when it became the employer's insurance carrier, it put itself in the place of the employer so far as compensation benefits under the Act, whether for disability or for death, were concerned. That is the necessary construction of § 935, 33 U.S.C. Accordingly, when it is admitted that the petitioner was the employer's insurance carrier under § 935 at the time of the employee's injury in 1967, it necessarily follows that the petitioner carrier is subject to all liabilities attaching to the employer on account of the injury, both by way of compensation payments to the employee and by way of death benefits in favor of the statutory beneficiaries under § 909. It is immaterial to its liability

for death benefits arising out of the injury in 1967 that its policy was later terminated in 1971. Just as the employer remained liable for the death benefits, even though death occurred after the employee ceased to work for the employer, so did the liability of the insurance carrier under its policy in favor of the employee continue for death benefits originating in the injury occurring when it was the employer's compensation carrier, even though it thereafter ceased to be the employer's carrier. That was the petitioner carrier's agreement under its policy. The Benefits Review Board, in holding that the petitioner carrier was liable for the death benefits in this case was merely enforcing the obligation which the petitioner had assumed when it issued its compensation insurance policy.

It is too late to argue, as does the petitioner insurance carrier, that the enlargement of liability for insurance benefits by the 1972 Amendments is either illegal or unjust. Those issues were examined and decided adversely to the petitioner's contention in *N., B. & C. Lines v. Director, Office of W. C. P., supra,* at 380-381 (539 F.2d). In that decision, it was pointed out (1) that death benefits were allowable under the Act long prior to the 1972 Amendments and (2) that such benefits could be validly increased by Congress after the injury and before death. *Hampton Roads Stevedoring Corp., supra* (184 F.2d at 78) the very authority on which the petitioner pins its argument, had decided that almost thirty years ago. Nor can the action of Congress in increasing such benefits by the 1972 Amendments be assailed on constitutional grounds or on grounds of fairness because "the employer and *the insurer* may have believed they had contractual rights in the limitation of benefits called for by the Act when, prior to 1972, they assumed these obligations."[4] (Italics added) Any claim of unfairness in holding an insurance carrier liable years afterwards for death benefits based on a finding of injury during the period of the carrier's policy is no more appealing than would be the claim of

[4] 539 F.2d at 381.

the employer to be relieved of a liability that only becomes compensable years after the employee has left its employment. The petitioner insurance carrier finds no merit in the claim of the employer for relief. By the same token, its own claim of immunity lacks appeal. The liability of the petitioner insurance carrier for the death benefits is plain.

It might not be amiss to comment that, in asserting a right to immunity for a liability arising out of an injury occurring during its coverage as against its own insured, the petitioner is assuming a position unlike that taken in any reported cases by any insurance carrier under the 1972 Amendments. In *Nacirema Operating Co. v. Lynn* (3d Cir. 1978) 577 F.2d 852, and *State Ins. Fund v. Pesce* (2d Cir. 1977) 548 F.2d 1112, both of which follow *Norfolk, Baltimore and Carolina Lines, Inc.*, the carrier stood with the employer, recognizing that, so far as death benefits under the 1972 Amendments, it took the place of the employer under its policy and assumed the employer's liability.

The petitioner insurance carrier has, also, challenged the penalty imposed on it under § 914(e), 33 U.S.C. The finding, however, is amply supported in the record and may not be disturbed.

The petition for review will be denied and the order of the Benefits Review Board will be affirmed.

WIDENER, Circuit Judge, Dissenting:

I respectfully dissent.

I would relieve the prior insurer of liability for compensating an entirely new class of claims which were only created by statute after its insurance contract with the now self-insuring employer had terminated.

On March 24, 1967, James T. Spence was permanently and totally disabled by an injury in the course of his employment with Terminal Shipping Co. (Terminal), and received compensation for this injury under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 908(a). The petitioner, Pennsylvania National Mutual Casualty Insurance Co. (Pennsylvania National) was Terminal's insurer on March 24, 1967, and pursuant to the insurance contract, Pennsylvania National paid Spence's disability benefits until his death on November 11, 1973. In the period between Spence's injury and his death, however, several significant events occurred. On January 1, 1970, Terminal was acquired by Atlantic and Gulf Stevedores, Inc. (Atlantic), which assumed all liabilities of Terminal. On February 1, 1971, Pennsylvania National's coverage of Terminal expired and Atlantic became the self-insurer of its new purchase. On November 26, 1972, more than a year and a half after Pennsylvania's coverage ceased, 33 U.S.C. § 909 was amended to provide death benefits to employees who were permanently and totally disabled in the course of their employment but whose death was not caused by the disabling injury. Prior to the date of this amendment, § 909 provided death benefits only when death was caused by the disabling injury. It is undisputed that Spence's death in November 1973 resulted from causes unrelated to his earlier injuries, and thus his statutory beneficiaries were eligible for death benefits under the 1972 amendment.

The issue presented in this case is whether an insurance company should be forced to pay for benefits not in existence until after the date its coverage has ended. The majority answers this question in the affirmative, and gives two reasons for its decision. First, the court appears to reject Pennsylvania National's argument that the cause of action for death benefits arises at the time of death. Second, the majority sees no distinction between the employer and the insured, and, therefore, since the employer is liable for the newly created benefits, the insurance company also is liable.

In support of its first argument, the majority notes that while the Act provides for two types of recovery —

compensation for disability and death benefits, both awards "derive their basis from the same event" — the initial injury. I cannot agree. First, as a matter of logic, a cause of action cannot accrue under § 909 (death benefits) until the employee dies. Of course, one of the requirements for recovering death benefits is a prior permanently and totally disabling injury, but I do not think a prerequisite for recovery can be said to give rise to a cause of action for death benefits before death has occurred. Second, if the majority is in fact rejecting the two cause of action theory, it declines to follow circuit precedent established in *Hampton Stevedoring Corp. v. O'Hearne*, 184 F.2d 76, 79 (4th Cir. 1950). In *Hampton*, we clearly held that the death benefit was a new and distinct cause of action from the injury benefit, and our decision on this point has been followed in *State Ins. Fund v. Pesce*, 548 F.2d 1112 (2d Cir. 1977). The precise issue in *Hampton* was whether the injury and death benefits would be considered separately or together in determining the maximum award available under the Act. This issue admittedly is somewhat different than the one before us today, but I do not believe this provides a basis for distinguishing the holding in *Hampton*, that death benefits create a separate cause of action for a different beneficiary.

The fact that two causes of action exist, however, does not mean that a prior insurer can avoid all death benefits once its contract is terminated. All benefits in effect during the term of coverage are the responsibility of the insurer, and so would any increase in benefits enacted after the insurer went off the risk. Long range payments under existing law and subsequent increases clearly are within the foreseeable coverage of an insurer under the Act. In the case at bar, however, we are not faced with a benefit which existed during the time of coverage or any increase in the amount of these benefits. In amending § 909, Congress created an entirely new death benefit for employees who were totally disabled on the job but died from causes unrelated to the injury.

In support of its argument that the 1972 amendment was only an increase in benefits, the majority cites *N., B. & C. Lines v. Director, Office of Workers' Compensation Programs*, 539 F.2d 378, 381 (4th Cir. 1976). Certain language in that opinion does support the majority's position, but the issue in that case was the constitutionality of the 1972 amendment. The court held that the amendment was not outside the admiralty jurisdiction, or so vague, or so harsh by retroactivity as to be constitutionally invalid. In support of this result, it noted that death benefits were recoverable before 1972, and thus expanding the causal clause to confer death benefits when death was unrelated to the job injury was not a "novel or radical concept." 539 F.2d at 381. While I acknowledge the holding that the expansion of death benefits by the 1972 amendment is not unconstitutional, I cannot accept the conclusion that this change in the law was only an increase in existing benefits. The amendment covers an entirely new class of claimants, survivors of injured longshoremen who die for any reason unrelated to their injury. Since everyone must die sometime, the class, then, is simply the statutory beneficiary of every longshoreman who has suffered permanent and total disability. The only authority cited by the court in *N., B. & C. Lines* for the proposition that the 1972 amendment was only an increase in benefits was *Hampton, supra*. In *Hampton*, however, the change in benefits was an increase in payments for funeral expenses and a removal of the maximum award payable. Both benefits were already covered by the Act, only the amounts were changed.

The majority provides further support for its holding by noting that the petitioner does not contest the fact that the employer is liable for the death benefits. It apparently takes this as some kind of an admission of liability by the prior insurer, and reasons that by entering into an insurance contract the insurer places itself in the shoes of the company. Since the employer remains liable for death benefits after the employee leaves his job, the argument goes, the insurance

company remains liable after its contract expires. I cannot agree.

As discussed above, I do not believe that this insurer should be forced to pay benefits when the cause of action arose and the benefits were not even created until after the insurance company went off the risk. A reason for my fundamental disagreement with the majority is because of the extreme burden it places on the insurer with a result so harsh that I think it could not be what Congress intended. This inequity can be illuminated by comparing the relative position of the prior insurer and the employer, or by comparing a prior and a subsequent insurer. Under the rule we lay down today, the prior insurer is left in a position so disadvantageous it cannot extricate itself. It is forced to pay claims for a new benefits, but cannot recover its loss by adjustment or charging of premiums. A subsequent insurer, however, either a new insurance company, or, as in the case at bar, the self-insuring company, does not face these problems. A new insurance company can adjust its premiums to compensate for the additional risk. The employer can pay the higher insurance premiums, look for another insurance company, or become a self-insurer.

Further, I think a central error in the majority opinion lies in its view of this case as an insurer versus an employer. This is demonstrated by the court's reliance on the following part of *N., B. & C. Lines, supra*, pointing out that (1) death benefits were allowed long prior to the 1972 amendment, and (2) such benefits could validly be increased. The majority fails to point out, however, that the insurance carrier in *N., B. & C Lines* was the insurer before and after the 1972 amendment and when the case came up on appeal. Obviously, in that setting the position of the employer and the insurer are the same. In the case at bar, however, the prior insurer's contract has long since terminated and the employer has become its own insurer. Thus, the employer and the insurance company described in *N., B. & C. Lines* are the same entity in the

case before us, for Terminal's owner, Atlantic and Gulf Stevedoring, elected to be its own insurer. The majority's failure to recognize this crucial distinction has contributed, I think, to the erroneous result we reach today.

The simple economic truth is that someone has to pay for the cost of this new benefit, and I do not believe we should place this burden on an insurance company whose contract ended long before the new benefits were created, and which has never been, nor can ever be, paid for the risk it is forced to assume. Based on the predictable costs of the 1972 amendment, a subsequent insurer could adjust its premiums accordingly. The employer can pay the increased premium or insure itself and recoup by increased rates. Indeed, Atlantic has made that decision by becoming and remaining a self-insurer of Terminal. But the prior insurer has no such option; I do not believe Congress intended such a harsh result.

United States Court of Appeals
For The Fourth Circuit

No. 78-1088

Pennsylvania National Mutual Casualty Insurance Company,
Petitioner,

v.

Louise E. Spence (Widow of James T. Spence), et al,
Respondents.

ORDER

The petitioner's petition for rehearing and the joint response to the petition for rehearing with a suggestion for rehearing has been submitted to the court. A poll of the court was requested, and in the poll, a majority of the judges eligible to vote, voted to deny rehearing en banc.

The panel considered the petition for rehearing and is of the opinion that it should be denied.

IT IS ORDERED that the petition for rehearing and suggestion for rehearing en banc are denied.

Entered at the direction of Judge Winter with the concurrence of Judge Russell. Judge Widener dissents.

For The Court,

/s/ WILLIAM K. SLATE, II,
Clerk.

May 3, 1979

APPENDIX II

STATUTORY PROVISIONS

33 U.S.C. § 908, Longshoremen's and Harbor Workers' Compensation Act:

Compensation for disability shall be paid to the employee as follows:

(a) Permanent total disability: In case of total disability adjudged to be permanent 66⅔ per centum of the average weekly wages shall be paid to the employee during the continuance of such total disability. Loss of both hands, or both arms, or both feet, or both legs or both eyes, or any two thereof shall, in the absence of conclusive proof to the contrary, constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

(b) Temporary total disability: In case of disability total in character but temporary in quality 66⅔ per centum of the average weekly wages shall be paid to the employee during the continuance thereof.

(c) Permanent partial disability: In case of disability partial in character but permanent in quality the compensation shall be 66⅔ per centum of the average weekly wages, which shall be in addition to compensation for temporary total disability or temporary-partial disability paid in accordance with subdivision (b) or subdivision (e) of this section, respectively, and shall be paid to the employee, as follows:

(1) Arm lost, three hundred and twelve weeks' compensation.

(2) Leg lost, two hundred and eighty-eight weeks' compensation.

(3) Hand lost, two hundred and forty-four weeks' compensation.

(4) Foot lost, two hundred and five weeks' compensation.

(5) Eye lost, one hundred and sixty weeks' compensation.

(6) Thumb lost, seventy-five weeks' compensation.

(7) First finger lost, forty-six weeks' compensation.

(8) Great toe lost, thirty-eight weeks' compensation.

(9) Second finger lost, thirty weeks' compensation.

(10) Third finger lost, twenty-five weeks' compensation.

(11) Toe other than great toe lost, sixteen weeks' compensation.

(12) Fourth finger lost, fifteen weeks' compensation.

(13) Loss of hearing: Compensation for loss of hearing of one ear, fifty-two weeks. Compensation for loss of hearing of both ears, two hundred weeks.

(14) Phalanges: Compensation for loss of more than one phalange of a digit shall be the same as for loss of the entire digit. Compensation for loss of the first phalange shall be one-half of the compensation for loss of the entire digit.

(15) Amputated arm or leg: Compensation for an arm or a leg, if amputated at or above the elbow or the knee, shall be the same as for a loss of the arm or leg; but, if amputated between the elbow and the wrist of the knee and the ankle, shall be the same as for loss of a hand or foot.

(16) Binocular vision or per centum of vision: Compensation for loss of binocular vision or for 80 per centum or more of the vision of an eye shall be the same as for loss of the eye.

(17) Two or more digits: Compensation for loss of two or more digits, or one or more

phalanges of two or more digits, of a hand or foot may be proportioned to the loss of use of the hand or foot occasioned thereby, but shall not exceed the compensation for loss of a hand or foot.

(18) Total loss of use: Compensation for permanent total loss of use of a member shall be the same as for loss of the member.

(19) Partial loss or partial loss of use: Compensation for permanent partial loss or loss of use of a member may be for proportionate loss or loss of use of the member.

(20) Disfigurement: Proper and equitable compensation not to exceed $3,500 shall be awarded for serious disfigurement of the face, head, or neck or of other normally exposed areas likely to handicap the employee in securing or maintaining employment.

(21) Other cases: In all other cases in this class of disability the compensation shall be 66⅔ per centum of the difference between his average weekly wages and his wage-earning capacity thereafter in the same employment or otherwise, payable during the continuance of such partial disability, but subject to reconsideration of the degree of such impairment by the deputy commissioner on his own motion or upon application of any party in interest.

(22) In any case in which there shall be a loss of, or loss of use of, more than one member or parts of more than one member set forth in paragraphs (1) to (19) of this subdivision, not amounting to permanent total disability, the award of compensation shall be for the loss of, or loss of use of, each such member or part thereof, which awards shall run consecutively except that where the injury affects only two or more digits of the same hand or foot, paragraph (17) of this subdivision shall apply.

(d)(1) If an employee who is receiving compensation for permanent partial disability pursuant to

subdivision (c)(1)-(20) of this section dies from causes other than the injury, the total amount of the award unpaid at the time of death shall be payable to or for the benefit of his survivors, as follows:

(A) if the employee is survived only by a widow or widower, such unpaid amount of the award shall be payable to such widow or widower.

(B) if the employee is survived only by a child or children, such unpaid amount of the award shall be paid to such child or children in equal shares.

(C) if the employee is survived by a widow or widower and a child or children, such unpaid amount of the award shall be payable to such survivors in equal shares.

(D) if there be no widow or widower and no surviving child or children, such unpaid amount of the award shall be paid to the survivors specified in section 909(d) of this title (other than a wife, husband, or child); and the amount to be paid each such survivor shall be determined by multiplying such unpaid amount of the award by the appropriate percentage specified in section 909(d) of this title, but if the aggregarte amount to which all such survivors are entitled, as so determined, is less than such unpaid amount of the award, the excess amount shall be divided among such survivors pro rata according to the amount otherwise payable to each under this subparagraph.

(2) Notwithstanding any other limitation in section 909 of this title, the total amount of any award for permanent partial disability pursuant to subdivision (c)(1)-(20) of this section unpaid at time of death shall be payable in full in the appropriate distribution.

(3) If an employee who was receiving compensation for permanent partial disability pursuant to subdivision (c)(21) of this section dies from causes

other than the injury, his survivors shall receive death benefits as provided in section 909(b)-(g) of this title, except that the percentage figures therein shall be applied to the weekly compensation payable to the employee at the time of this death multiplied by 1.5, rather than to his average weekly wages.

(4) An award for disability may be made after the death of the injured employee. Except where compensation is payable under subdivision (c)(21) of this section, if there be no survivors as prescribed in this section, then the compensation payable under this subsection shall be paid to the special fund established under section 944(a) of this title.

(e) Temporary partial disability: In case of temporary partial disability resulting in decrease of earning capacity the compensation shall be two-thirds of the difference between the injured employee's average weekly wages before the injury and his wage-earning capacity after the injury in the same or another employment, to be paid during the continuance of such disability, but shall not be paid for a period exceeding five years.

(f) Injury increasing disability:

(1) In any case in which an employee having an existing permanent partial disability suffers injury, the employer shall provide compensation for such disability as is found to be attributable to that injury based upon the average weekly wages of the employee at the time of the injury. If following an injury falling within the provisions of subdivsion (c)(1)-(20) of this section, the employee is totally and permanently disabled, and the disability is found not to be due solely to that injury, the employer shall provide compensation for the applicable prescribed period of weeks provided for in that section for the subsequent injury, or for one hundred and four weeks, whichever is the greater. In all other cases of total permanent disability or of death,

found not to be due solely to that injury, of an employee having an existing permanent partial disability, the employer shall provide in addition to compensation under paragraphs (b) and (e) of this section, compensation payments or death benefits for one hundred and four weeks only. If following an injury falling within the provisions of subdivision (c)(1)-(20) of this section, the employee has a permanent partial disability and the disability is found not to be due solely to that injury, and such disability is materially and substantially greater than that which would have resulted from the subsequent injury alone, the employer shall provide compensation for the applicable period of weeks provided for in that section for the subsequent injury, or for one hundred and four weeks, whichever is the greater.

In all other cases in which the employee has a permanent partial disability, found not to be due solely to that injury, and such disability is materially and substantially greater than that which would have resulted from the subsequent injury alone, the employer shall provide in addition to compensation under paragraphs (b) and (e) of this section, compensation for one hundred and four weeks only.

(2) After cessation of the payments for the period of weeks provided for herein, the employee or his survivor entitled to benefits shall be paid the remainder of the compensation that would be due out of the special fund established in section 944 of this title.

(g) Maintenance for employees undergoing vocational rehabilitation: An employee who as a result of injury is or may be expected to be totally or partially incapacitated for a remunerative occupation and who, under the direction of the Secretary as provided by section 939(c) of this title, is being rendered fit to engage in a remunerative occupation, shall receive additional compensation necessary for his maintenance, but such additional compensation shall not exceed $25 a week. The

expense shall be paid out of the special fund established in section 944 of this title.

(h) The wage-earning capacity of an injured employee in cases of partial disability under subdivision (c)(21) of this section or under subdivision (e) of this section shall be determined by his actual earnings of such actual earnings fairly and reasonably represent his wage-earning capacity: *Provided, however,* That if the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning capacity, the deputy commissioner may, in the interest of justice, fix such wage-earnings capacity as shall be reasonable, having due regard to the nature of his injury, the degree of physical impairment, his usual employment, and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future.

(i)(A) Whenever the deputy commissioner determines that it is for the best interests of an injured employee entitled to compensation, he may approve agreed settlements of the interested parties, discharging the liability of the employer for such compensation, notwithstanding the provisions of section 915(b) and section 916 of this title: *Provided*, That if the employee should die from causes other than the injury after the deputy commissioner has approved an agreed settlement as provided for herein, the sum so approved shall be payable, in the manner prescribed in this subsection, to and for the benefit of the persons enumerated in subsection (d) of this section.

(B) Whenever the Secretary determines that it is for the best interests of the injured employee entitled to medical benefits, he may approve agreed settlements of the interested parties, discharging the liability of the employer for such medical benefits, notwithstanding the provisions of section 916 of this title: *Provided*, That if the employee should die from causes other than the injury after the Secretary has approved an agreed settlement

as provided for herein, the sum so approved shall be payable, in the manner prescribed in this subdivision, to and for the benefit of the persons enumerated in subdivision (d) of this section.